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ACCESS TO CONFIDENTIAL INFORMATION REGARDING CARTELS WITHIN THE EU CONTEXT - THE MANAGEMENT OF INFORMATION RELATED TO LENIENCY

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Abstract

Access to Confidential Information Regarding Cartels within the EU Context - The Management of Information Related to Leniency

On 14th March 2017, with the Evonik Case, the European Court of Justice refused a cartel member's safeguard to whom the European Commission had conceded protection in exchange for information (the Leniency Program). Never before the Commission had been able to publish cartel's documents without protecting its information's source (the Whistleblower). This verdict shall allow cartels' Victims to access more information needed to obtain compensation for damages, but may jeopardize Commission's Leniency Program.

The purpose of this paper is to analyze how undertakings and European Authorities should manage the access to confidential information regarding cartels from this point onwards.

Keywords: Competition Law, Cartels, European Commission's Leniency Program, Access to Documents

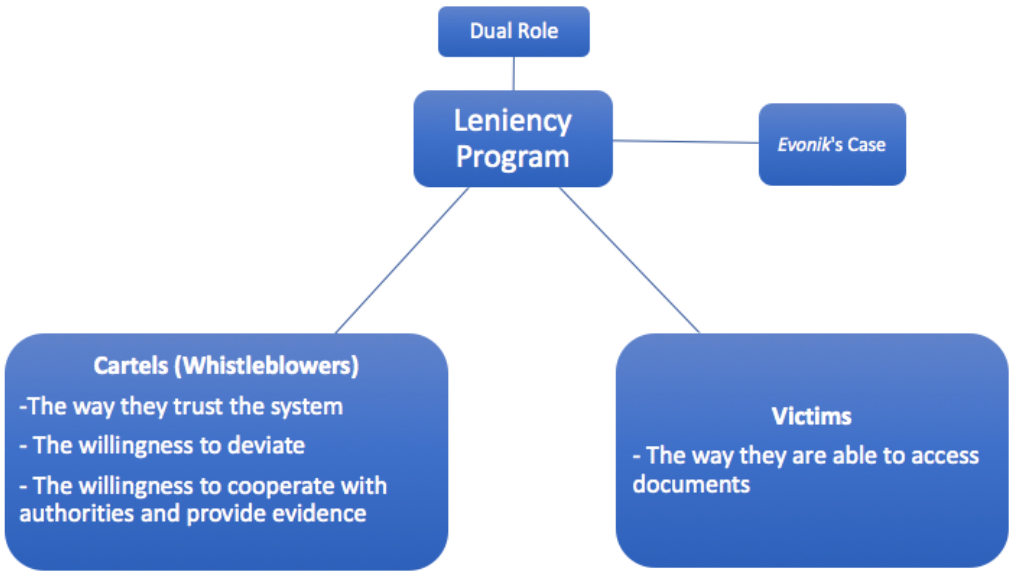

Fig. 1 - Leniency Program's Dual Role

I. Introduction

Being able to take a peek at confidential documents regarding investigations into the activity of cartels is, among other things, fascinating. Who would pass the opportunity?

However, attempting to access that information is not just a matter of morbid curiosity. It is more often a matter of survival for Victims who have suffered at the hands of cartels and need evidence to sue them for damages. It would of course be useless to ask cartel members for such documents. They would immediately suspect the applicant's intention. Therefore, the most used route is to apply to institutions such as the European Commission (hereafter the Commission), since it collects, and hoards, masses of fairly disorganized information on cartels.

How does the Commission come by this information? On the one hand, it is the fruit of investigations coordinated by Directorate-General (DG) for Competition that is vested with significant administrative powers. Indeed, the latter gathers information regardless and in spite of the (ill) will of cartel members. On the other hand, DG for Competition has opened a Leniency Program. Such a tool seeks out the weakest links of cartels, and invites them to offer up information about the cartel and its members, in exchange for impunity. A traitor, or Whistleblower, is thus born. The information provided by Whistleblowers is the key to the compensation of Victims, but should the Victim have access to that information?

On the basis of case-law analysis, this Work Project seeks to address the issue of how the Commission and the European Court of Justice (the ECJ or the Court) **manage access to Leniency documents** by Victims of cartels. Naturally, the less access is conceded to Victims the more trust (and information) will ensue between Whistleblowers and DG Competition. Concomitantly, compensation for Victims has been acknowledged as a duty of DG for Competition. In this framework who is to be sacrificed? The Whistleblower or the Victim?

A cartel[1] can be described as a market situation that occurs whenever a group of undertakings operate together, eliminating competition, raising the prices above normal and reaching higher profits. A cartel formation is an illegal practice against International Commercial Law. Even acknowledging that, a lot of undertakings keep on using it as a very profitable strategy[2]. Besides being an obstacle to free-competition, a cartel also damages the final consumer tremendously.

Case-law of the ECJ as a Basis

In order to provide the audience with some background, it is pertinent to clarify that the entire set of cases chosen for analysis (52 cases on Access to EU Competition Law Documents and about 33 per cent of those relating to Access to Leniency Documents) regards situations in which a private party (more often than not a Victim of a cartel) has applied for access to an investigative file or, in other particular cases, in which a private party (probably a cartel member) has sought for confidentiality of those files. The point is to study how cartel participants manage two issues: deciding to give documents (i.e., information) to the Commission and concomitantly receive assurance from the Commission that the latter will impede Victims' access to information about their own undertakings. In order to do that it is also necessary to factor in Victims' behavior.

Under European Union (EU) Law[3], there are three possible sources of this type of Case-law: two EU Regulations and one EU Directive. An EU Regulation is a piece of EU legislation aimed at creating Supranational harmonized rules for all Member States, while an EU Directive is a Supranational piece of EU Law that instructs Member States to legislate on a certain topic but within a framework or objective that the Directive provides and requires.

[1] Contrarily to what many tend to think, a cartel is not the same as an oligopoly. An oligopoly occurs when two or more big undertakings control the market and set their prices decisions based on the expectations of what the others will decide. Even though, oligopoly is not a perfect competition situation, it's common and it is not prohibited.

[2] Cartels continue to be a very actual topic in everyday news, investigations and Court cases. An example of a Cartel that is deeply concerning our Country (Portugal) at the moment is the "Fire Cartel".

[3] According to Article 288 of the Treaty on the Functioning of the European Union (TFEU).

Regulation No 1049/2001

The first source of relevant Case-law arises from the Transparency Regulation (Regulation No 1049/2001).[4] It exists to allow the public access to any type of document held by the Commission, including those related to cartels and Leniency statements[5].

Regulation No 1/2003

This second Regulation lays out the framework for the Commission's investigation of cartels and collection of Leniency statements. Since its main purpose is the collection of information, it is highly restrictive of what it is called third-party access. In other words, it does not make room for Victims of cartels (who are, by definition, extraneous to the information collection process) to vision the information[6]. If only this Regulation existed it would be almost impossible to access cartels' information.

Directive 2014/104/EU

Still there is a third source of Case-law that is relevant. A different type of EU legislative instrument, Directive 2014/104/EU was issued to set clearer rules within National legal systems on compensation actions following Competition Law infringements. Thus, and since the quest for compensation for damages usually takes place in the domestic Courts of the EU Member States, some cases (such as *Pfleiderer*[7] and *Donau Chemie*[8]) are related to Preliminary Rulings of the ECJ. These take place when the National Courts request that the ECJ clarifies whether National

[4] It distinguishes an applicant by right ("Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State") from an applicant by grace (any natural or legal person who do not satisfy the conditions to be considered an applicant by right).
[5] Hereunder there is no room for differentiation between the applications of say a Victim of a cartel and a journalist.
[6] In fact, it actually goes as far as stating "The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States." This is in accordance with Regulation No 1/2003, Article 27, 'Hearing of the parties, complainants and others', (2).
[7] C-360/09 *Pfleiderer AG v Bundeskartellamt*.
[8] C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG*.

rules regarding access of Victims to Leniency statements held by the National Competition Authorities are compatible with EU Law.

In sum, Case-law that is relevant to this study arises from the above-mentioned sources: Regulation 1049/2001, Regulation 1/2003 and Directive 2014/104/EU. The cases that were chosen for analysis had to be found, organized and analyzed. It has been a significant task but an interesting and rewarding one. In this manner, it is now possible to present the audience with an organized source of analysis. We also believe that this basis (that is now intelligible) is very important to anyone wishing to understand this subject.

The Three KEY Concepts of Our Analysis

We have identified three KEY concepts relevant to our analysis: Commission's **Leniency Program**; **Whistleblower** – a former member of a cartel that leaks information to the Commission in exchange for immunity; and **Antitrust Victims** - undertakings and final consumer seeking compensation for all the damages suffered**.**

Leniency Program

In the EU, there is a Leniency Program, since 1996[9], with two purposes: finding and destroying cartels and compensating Victims. According to the Online English Dictionary definition, "leniency" means: "clemency, the fact or quality of being more merciful or tolerant than expected.". In practice, for the Commission, the meaning is basically the same: a cartel participant is invited to cooperate with the investigating authorities, saving himself from punishment. Usually, this means total or partial impunity from fines, but never from the civil law consequences of an infringement of EU Law[10] (namely liability in damages caused to third parties). For impunity to be granted, the undertaking has to be the first to provide the Commission with all the documents relevant to the

[9] Based on the United States (US) Department of Justice Corporate Leniency Policy of 1993 (which replaced the initial one of 1978), according to Wills (2006).
[10] Infringement of Article 101 of the TFEU.

investigation it possesses, showing total willingness to cooperate, and terminating its participation in the cartel[11] (European Commission 2016).

The Whistleblower

On the one hand, in spite of the fact that their conduct is as corrupt as the one of other cartel participants, Leniency participants (or the Whistleblowers) are usually well protected by the Commission and the ECJ, since they reveal themselves to be precious sources of information in cartels' apprehension[12].

On the other, although Leniency documents are extremely difficult to be obtained[13] by third parties[14], it is not impossible that this will happen. This is mainly because the Commission publishes two types of Decisions pursuant to each investigation that is undertaken. The first type of Decision is more restricted in detail (first non-confidential version) and is issued immediately after the investigation. The second type of Decision is much more detailed (the extended version). Cartel members who decide to take part in a Leniency Program are, *ab initio*, facing two risks: they may not receive complete pardon and they may (in the medium to long term) be exposed.

Antitrust Victims

Cartels have Victims who are forced to pay higher prices for the same products or are taken out of the market. And EU has said it is vital that Victims get compensation through cartel exposure. Victim compensation comes about in two ways. First, Victims eagerly wait for Commission's

[11] The undertaking may not be fit to apply to the Leniency Program if, at any time, it took steps to coerce others to participate in a cartel.
[12] At the heart of every investigation of cartels by the Commission is a so-called hearing officer. He/she manages the preliminary approach to the investigation, being responsible for organizing and conducting oral hearings and acting as an independent arbiter when a dispute about the effective exercise of procedural rights arises in antitrust proceedings.
[13] The Court only states this ruling on a case-by-case basis.
[14] Undertakings, individuals or even Member States injured by a cartel seeking to obtain grounds for compensation.

Decision to fish out elements on which to ground requests for compensation[15]. Secondly, Victims also badger the Commission incessantly with requests for information.

The role of the ECJ and the Selected Case (*Evonik* Case)

At the vertex of this conflict, when it comes before the Courts and in order to adjudicate on the balance between pardon and exposure of a Whistleblower, is the ECJ. The objective is to look at Court cases and see the decisions that have been made, opposing Victims and cartels, when there is no agreement between the parties and the Commission concerning the (quality and amount of) information that should be released after a Whistleblower has benefitted from the Leniency Program. That's the reason for the majority of the cases to be in the format "*some party*" against "*the European Commission*".[16]

The main Case selected for discussion is the recent *Evonik Degussa v Commission*[17]. We feel that it represents both a clarification of the jurisprudence of the ECJ and a turn-around moment in the enforcement of the rules for the protection of Victims of cartels. On 14th March 2017, the European Court of Justice ruled on a request from a member of a cartel and participant in the Leniency Program (Evonik Degussa) to forbid the disclosure of confidential information the Commission had decided to publish. This case comes forth within both mentioned Regulations.

It was expected that the ECJ would apply one of the two classical approaches: no access to competition files due to presumptions of harm or no documents for third parties. However, two unexpected facts took place in the *Evonik* case. The first was that the Commission broke the pattern of protection and proposed to release Whistleblower's confidential information. The second was that when Evonik desperately sought comfort from the ECJ, the very Court that had

[15] Whenever cartel members are notified by the Commission circa what is about to be published, before it is published, they are quick to file injunctions, attempting to impede the Commission from releasing information to the public.

[16] See Appendix 1 – Access to Competition Law Documents Case-law Table.

[17] C-162/15 P *Evonik Degussa GMbH v Commission*.

upheld the entire theory of presumptions of harm - even in spite of severe criticism from the doctrine (Rossi and Vinagre e Silva 2017) - changed route.

This Work Project aims to analyze how the impact of this case might affect the management of European undertakings in general. How to manage information related to Leniency?

II. Literature Review and Hypothesis

The number of researchers that address the topic of public access to Leniency documents held by the EU demonstrates and confirms that this is a very interesting but complex subject. Therefore, it is only possible to analyze a small fraction of the vast related Literature. It presents a growing business relevance as undertakings and individuals are, more and more, interested in getting compensation when they are exposed to any situation they regard as unfair and cartels want to impede them from accessing restitution.

Many authors, mainly in the legal field, have found of utmost importance to write and debate about cartels and how the Commission deals with them. Namely, regarding the access to Leniency documents, these authors have different theories concerning the most appropriate technique to disclose files, the amount of the files and the nature of those files.

The main authors we decided to quote were Rossi & Ferro, Wils, Cauffman, Saavedra and Anastácio. Even though we know we should present them based on the theories they defend and not on who they are or they represent, we also believe that in this case it is very relevant to choose significant opinions from different geographical perspectives: Portugal, Germany, EU and the US.

Usually, the methodology used to perform their research and reach their conclusions is a careful and critical examination of Court Cases, Opinion's Advocate General, Pending Cases and other sources. Only a qualitative analysis is conducted since a quantitative one does not seem to help to understand the way this process of access to information occurs. The latter would only be adequate for the calculus of the right compensation to attribute to Victims. Nonetheless, if we

knew the number of pending cases of this sort in the ECJ, it could help realizing the dimension of this topic.

Rossi and Ferro (2016) refer that the ECJ has demolished the once mandatory consideration of partial access[18] (through Case Law) in order to protect the Leniency Program. According to these authors, that is the reason why private enforcement is so hard to obtain at the EU level. Still according to the same authors, this is not different from what occurs in Portugal and in other EU countries apart from Anglo-Saxon nations. Since its entry into force, Regulation No 1049/2001 was seen as an opportunity for more access to documents and so more compensation. Later, Directive 2014/104/UE attempts to establish clearer rules. Its transposition to national law might be the beginning of a change.

From a comparative perspective, Wils (2006) compares EU's Leniency Notice with the US Department of Justice's Corporate Leniency Policy, in what respects the conditions to apply and the way it attributes full immunity (both to fines and criminal charges) and orders its applicants to restitute, whenever possible, injured parties. Differently, EU's Leniency Policy only concedes immunity to fines (total or partial) and no immediate restitution has to be made, which is a big difference, mainly regarding compensation efficacy.

Linked both to EU and National Law, Cauffman (2011) and Anastácio (2012) analyze the possible modifications the *Pfleiderer* case might bring to the propensity to Leniency documents refusal which has been verified both in National Courts and in the ECJ. In the *Pfleiderer* case, where a Victim (Pfleiderer) applied for access to antitrust files held by the German National Competiton Authority, the Court ruled it could not be impossible for Victims to access cartel information, giving discretion to National Courts to "weigh, on a case-by-case basis, the respective interests in favor

[18] Partial access occurs when a document is redacted and part of the information contained in it is blanked out.

of disclosure of the information provided voluntarily by the applicant for leniency and the protection of that information"[19], without however forgetting Germany belongs to the EU.

Cauffman (2011), Saavedra (2012) and Anastácio (2012) defend it is necessary to preserve the attractiveness of the Leniency participation because it benefits directly many injured parties, with the only exception of the ones affected by the Leniency participants (who have to be protected, for the sake of the effectiveness of the Program). Saavedra (2012) proposes a solution for the document disclosure balance: only Leniency participants for immunity should be completely protected; the other cartel participants, even if they cooperate with the Commission later, should not. Therefore, the Commission should bring a quasi-*Pfleiderer* balance test into deliberation and enable Regulation No 1049/2001 to follow-on actions.

But there seems to be still room to investigate what could be done so that Leniency participants' Victims could also be compensated. These Victims should be compensated and whenever they are not, there is an inconsistency in the Leniency Program, because it was created with that initial purpose. In fact, the uncertainties as to the progress and setbacks of the Commission and the ECJ relating to information access given to Victims is an untenable situation. It seems then appropriate to study this problem from a more managerial perspective, in order to find a better solution, already incorporating possible changes brought with the *Evonik* case. It would be also interesting to consider the impacts on an undertaking that falls due to a cartel situation or an undertaking deciding to join a cartel or even a cartel participant considering applying to the Leniency Program. Overall, will the *Evonik* case allow for more access to files but less collected information?

The objective of this Work Project is to find a hypothetical outcome which promotes more cartel findings and at the same time more Victims' remedies.

[19] C-360/09 *Pfleiderer AG v Bundeskartellamt*.

III. Methods and Cases

The methodology used was a qualitative documental analysis, mainly based on Case-law (Court cases on access to Competition documents), pending cases, orders, decisions, a detailed analysis and comment of the *Evonik* Case, literature interpretation, and rational hypothesis discussion.

Concerning Case-law on Access to EU Competition Law related Documents, 52 cases were analyzed following a chronologically organized table[20], containing ECJ Judgments on Access to Documents from 1998 until 2017[21]. The analyzed cases, where Victims mainly used Regulation 1049/2001[22], illustrate both the effort of Victims to obtain documentary evidence from the Commission (fundamental to assure compensation) and the reaction of cartels to these requests. We are particularly interested in the reaction of cartels. A research by Member States' support given to the applicants (or to the Commission) was also performed.[23]

One could immediate conclude that for more than two decades this problem has been addressed at Court several times, both by public and private parties, raising its intensity over the last 5 years. And there are not few times when the Court annuls the Commission's refusal of disclosing certain documents, giving a partial and sometimes even ambiguous response.

Specifically on Access to Leniency Documents legal framework[24], 17 cases from these 52 (roughly 33%) were identified. From this sample, the number of cases where applicants were Victims of cartels seeking compensation (11 out of 17) was higher than the number of cases where applicants were cartel and Leniency Program participants demanding for confidentiality (the remaining 6 cases)[25]. However, out of the 11 cases where the applicants were Victims of

[20] See Appendix 1 – Access to Competition Law Documents Case-law Table.
[21] The analyzed cases have their beginning dates ranging from 1996-2015 and Judgment dates from 1998-2017.
[22] On the 52 analyzed cases, Reg. 1049/2001 was used on 45 of them and Reg. 1/2003 on 14 of the cases.
[23] See Appendix 2 – Statistical Table of Member States Intervention.
[24] See Appendix 3 – Access to Leniency Documents Case-law Table.
[25] See Appendix 4 - Leniency Case-law: Number of Victims of Cartels (seeking compensation) vs Number of Cartel Members (demanding confidentiality).

Cartels, in 6 there were Cartel interventions seeking to impede the documents' release. This is illustrated in the Pie Chart presented below (*Fig. 2*).

These 17 cases were examined in deeper detail and compared to *Evonik*'s ruling whenever justified. Noticeably, a significant part of the applicants (9 out of 17) were Germans. The most relevant of the 17 cases are presented in the following paragraphs.

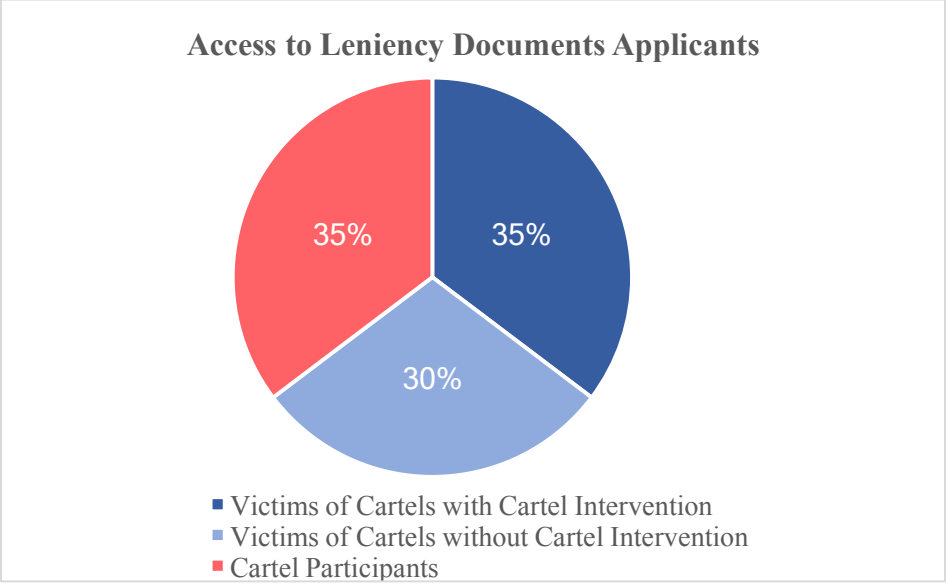

Fig. 2 - Access to Leniency Documents Applicants

In *Bank Austria v Commission*[26], the applicant (a **cartel member**) tried to impede the publication of the Commission's decision to impose fines on the "Lombard Club" (a bank cartel), alleging professional secrecy violation and asking for interim relief[27] which was denied.

In *EnBW v Commission* [28], a **Victim** required access to Leniency documents circa a cartel of "gas isolated switch air". Even though the Commission argued that the disclosure "would deter future potential leniency participants", the Court protected the applicant, annulling the refusal of the

[26] Case T-198/03 *Bank Autria v Commission*.
[27] The request of a grant by the Court to mantain a pending trial until the question is solved.
[28] Case T-344/08 *EnBW v Commission*.

Commission to disclose, once the latter had justified the refusal based on non-applicable exceptions. Nonetheless, on its appeal[29], the Commission won.

In *NL v Commission*[30], the Kingdom of the Netherlands (NL) was asking for a file as **Victim** of a Dutch cartel for the supply of road pavement bitumen, but the Court dismissed the action stating that Member States should "facilitate the achievement of the Union's tasks", namely the need to protect files in the Leniency Program.

In *CDC v Commission*[31], the applicant was a group of **Victims** (CDC – Cartel Damage Claims) seeking access to documents to justify its right to demand compensation from "the hydrogen peroxide and perborate" cartel[32]. The Court decided in favor of the applicant, after the Commission failed at proving the content would undermine the investigation.

In *Reagens v Commission*[33] partial access was conceded to this **Victim** but only to non-confidential information (still very limited data).

In *Akzo Nobel and Others v Commission*[34], a **cartel participant** (of the cartel where Evonik Degussa was the Whistleblower) sought restriction of confidential information. Since rejecting a claim for confidentiality violated the professional secrecy principle, the Court suspended the Commission's rejection of a claim for confidentiality. However, it was again a dubious verdict, because the ECJ also dismissed the interim relief.

In *LVM v Commission*[35], the "automotive glass" **cartel asked to intervene** (probably in order to become aware of the documents disclosed to the **Victim - LVM**), but the action was dismissed.

[29] Case C-365/12 P *Commission v EnBW*.
[30] Case T-380/08 *NL v Commission*.
[31] Case T-437/08 *CDC v Commission*.
[32] Evonik Degussa belonged to this cartel and since it was the Whistleblower, it acted in this case as a supporter of the defendant (the Commission).
[33] Case T-181/10 *Reagens v Commission*.
[34] Case T-345/12R *Akzo Nobel and Others v Commission*.
[35] Case T-419/12 *LVM v Commission*.

In *AGC Glass Europe and Others v Commission*[36], the **cartel participants** of the above mentioned automotive glass cartel requested for confidential treatment, opposing themselves to any Victims' access to related documents. The Court rejected it, and dismissed its appeal case[37].

Other Court cases were simply removed, meaning an agreement was negotiated and there was no need for further trial.

Concerning European Institution's opinion towards this issue, the Council of the European Union and the Commission have gained reputation as pro-institutional interveners, while the Parliament has demonstrated to be a more pro-access intervener.

In the results of the Case-law analysis performed for this research, it is also possible to distinguish Member States who are pro-access (Denmark, Finland, the Netherlands and Sweden) from the more conservative ones (Czech Republic, France, Germany and Spain), by statistically registering the amount of times they intervene for the release of data or confidentiality treatment.

Similarly to other Leniency Programs across the globe, the US Department of Justice and UK Office of Fair Trading have the "Amnesty Plus"- an additional reduction of the fine in the first cartel case, if that cartel participant denunciates another cartel. In fact, there is a high probability that an undertaking participates in more than one cartel, obtaining economies of scale by overcoming normative and moral barriers, organizational planning and experience (Wils, 2006). Maybe this could be an option for the EU to consider.

But can anyone trust a Whistleblower, the one who has already betrayed once?

Actually, **the Commission needs the denunciator**. Therefore, it might be said that effective Public enforcement requires a shady actor, until better methods are found. This amounts to the reverse side of love for a thief: by conceding him this pardon and then protecting him against the

[36] Case T-465/12 *AGC Glass and Others v Commission*.
[37] Case C-517/15 P *AGC Glass and Others v Commission*.

disclosure of the information which he provided and that condemns him, Victims of cartels are abandoned to their own fate, without opportunity for civil actions for damages. This occurs because what the Leniency Program does is exactly offer the Whistleblower protection, not only in immunity to fines, but also against requests for access to documents of the Commission files on cartel cases. This is where the Court traditionally stated there was **presumed harm** to the investigation.

On 14th March 2017 something seems to have changed. This change was brought about by the ruling of the ECJ with the case C-162/15 P *Evonik Degussa v Commission*. As explained before, this Case is not about a Victim asking for access to the Commission's files on cartels. The Case is about the Whistleblower (Evonik Degussa) seeking to impede the Commission from releasing information *ex oficio*[38] (and *erga omnes*[39]) via the rules that govern Leniency Proceedings (Sectoral Rules) as Regulation No 1/2003. Besides, Evonik Degussa proposed that Regulation No 1049/2001 should be used in such a way that the **presumptions of harm** developed in the past (when Victims wanted to access the file) via Regulation No 1049/2001 should be superimposed onto the Sectoral Proceedings of access to Leniency documents. Evonik (the Whistleblower) held that publish that confidential information, including several business secrets, in a non-confidential document would undermine the principle of equal treatment and legitimate expectations that substitutes the basis of the Leniency Program. Moreover Evonik also held that the Hearing Officer had behaved inadequately. Who is right?

IV. Final Discussion and Analysis of the Benefits of Role-play in Leniency Program

As previously proved with multiple evidence, Antitrust is one of the areas where access to documents was made very restrict by the Court. In fact, there is a clear **trade-off** between the

[38] Legal Latim expression meaning "out of duty".
[39] Legal Latim expression meaning "for everyone".

information the Commission wants to get (through granting immunity to the one that provides that evidence) to punish cartels – public enforcement - and the one it wants to share to help victims being compensated – private enforcement. As Cauffman (2011) mentioned the threat of disclosing information is that it "(…) may discourage cartel participants from applying for leniency in the first place, which would significantly impede the discovery and punishment of cartels, which would in turn lead to a lower degree of compensation of cartel damage."

In the case of Evonik Degussa, the latter sought to have the Court declaring that even when the Commission itself finds that certain information (concerning the Whistleblower) may be released *ex oficio* by the Commission (after 5 years), under Regulation No 1/2003 and regardless of requests from Victims, the Court should treat the matter as if the request for information had been originated from a Victim, and therefore consider the **presumed harm** clause. The Court refused the request and stated in paragraph 79 of *Evonik*'s Judgement that both regulations involved have different objectives: Regulation No 1049/2001 governs third party access whilst Regulation No 1/2003 governs the publication of Commission Decisions finding infringements of Trade. And that the restrictions (to access) governing the first may not be superimposed onto the second.

In fact, we believe it is still early to understand exactly what this means. We think that wherever there is Sectoral detail (take Regulation No 1/2003 for example), the Court always ensures that those rules override Regulation No 1049/2001. The Court states that if it is the Commission itself that considers that the information may be released, then there is **no place to presume that the release of information will be harmful to the Commission's investigation**. Also from a formal point of view, in this decision, the weight of Sectoral detail (in this case Antitrust) is heavier than any general rule, regardless of the substance. It does not matter which one grants more or less access, what matters is that in this case the Sectoral rule (coupled with the Commission's discretion) overrides the general one (that is deemed to be non-applicable).

Now an undertaking (i.e. Victim) of a cartel might have a greater chance of managing the access to a document protected under the Leniency Program. This even without requesting the documents. As the Commission may decide to publish it *ex oficio*. All things considered, Whistleblower shall have some benefits via the reduction of fines, but he cannot be pardoned on its bad conduct as a member of a cartel. The risk is that every measure has its consequences, and therefore the Whistleblower will no further be willing to provide information to the Commission in the future, knowing its protection will be weaker.

Importantly, the Court is beginning to construe[40] a rebuttable presumption that after a five-year period the information, normally, loses its confidential status[41]. Nonetheless, in our opinion, five years is a very short time in business terms and also in an undertaking's longevity, therefore it might be prudent to protect the Whistleblowers longer.

Still, as the Court can only deliver its ruling on precisely what is being asked, it might be said that Evonik should have opposed the argument that information will still be relevant after 5 years. It is reasonable to acknowledge that undertakings considering to confess Cartel involvement, will from now on be aware that their protection is not *ad aeternum*.

However, there are not only economic and legal aspects to take into consideration when protecting the Whistleblower. The moral and social damage may also be substantial. In fact, it is easier if we think of it in micro terms and then move on to macro.

With that purpose, lets imagine that the Whistleblower is not an undertaking among others in a cartel, but an individual inside a corporation who decides to expose a fraudulent situation. If after he reveals this secret information to the Commission or to a National Competent Authority, the Commission releases information that specifically allows to identify that individual, he will not

[40] In paragraphs 63 to 67 of the Evonik Case.
[41] Under Regulation No 1/2003.

only be fired and sued, but he will also be regarded as a traitor by the whole industry. Illustrative of such an argument, according to *The Guardian*, almost fifty years ago, Stanley Adams decided to became a Whistleblower, by handling over to the Commission a series of documents denunciating Roche's participation in a vitamin cartel *("Blowing the final whistle 2001"*). When it was found the documents had came from Adams' office he was immediately fired and sued. He was publicly crucified and regarded as a traitor. Realizing her husband was going to be in-prisoned for industry espionage, Adam's wife committed suicide. Only ten years later he did managed to have some restitution, that certainly did not cover all his losses.

Taking all these factors into consideration, it is fair to argue that the Commission should erase from the documents and data to be disclosed anything that could possibly incriminate the Whistleblower, but this could be very hard to ensure.

Until now, in principle, Victims would not be able to access cartel documents to require compensation. With the *Evonik* case, the Court seems to have opened a new insight, by stating that if the Commission considers appropriate to release certain cartel documents the Whistleblower should not be allowed to impede it. This is an entirely new paradigm for managing confidential information and the Leniency Program. The Court appears to be giving the first steps towards more cartel Victims' protection, and this will certainly have impacts in the management of EU undertakings. In Judicial terms, the Court has delegated a high degree of freedom of decision to the Commission, which will be taken further on into account by all interveners in this type of processes. We will have to be very attentive if, in the near future, any Whistleblower will be able to impede the Commission from exposing certain information. If that occurs, the Court will be giving two contradictory answers, aggravating this topic's ambiguity. We also have to take into consideration that the Court reinforced the responsibility of the Hearing Officer (on paragraphs 55 and 56 of the *Evonik* case) and to observe the impact of this in future judgements.

The **most immediate hypothesis** that comes to our minds for this balance between private and public enforcement would be to maintain the present situation, and try to develop the Leniency Program even in the context of doubtable protection to the Whistleblowers and very restrict access and limit compensation to the Victims.

The **second solution would be a more ingenious and costly side-deal**. Considering that the most important factor is that the Commission effectively receives the information, the latter could work as middleman in the compensation and restitution process to the injured parties. The Commission could make a complete theatrical staging, secretly planned with the Whistleblower (through a sort of a side deal based on confidential clauses), where the Whistleblower pretends to be accused alongside with the other cartel members and then the Commission pays for all his expenses and **grants full protection to this Whistleblower**. The Commission would pay to truly protect its source of information. But would it be possible to make this kind of agreement? In our opinion, the main risks would be information leaks and cartels trying to take advantage of this situation by setting up fake scenarios. If that happens, the solution would probably work only during some years but it could be fundamental for the Commission to understand how cartels internally coordinate. Even though the European Authorities would be totally forgiving a guilty participant of a cartel, maybe that is the price they must pay to enhance the Leniency Program.

V. Conclusion

To sum up, we have no doubts that information is something crucial and its use and release has to be very well managed by every undertaking and National or European Authority, in all occasions. This is a point of no return.

Nevertheless, the solutions the Court has been presenting are somehow ambiguous: even though most of the times they protect the Whistleblower, sometimes they also give some reason to the injured parties.

The impact of the decision taken in *Evonik* Case is still difficult to measure but we believe that not protecting the Whistleblower may jeopardize the future of the Commission's Leniency Program. That is the reason why we defend it is fundamental to find an alternative solution and we trust the proposed side-deal would allow for more information and simultaneously more access to it.

VI. Direction to Further Research

We confidently believe this subject could be further explored, using a more quantitative approach - **Game Theory**, in order to determine the incentives cartel's participants have to collaborate with the Commission within the existing or enhanced Leniency Program. Additionally, a model to quantify how much it would be fair for the ones injured by a cartel to receive, depending on different (and well-proofed) variables, would also be a valid contribute.

VII. References

Anastácio, Catarina. 2012. "Acórdão do Tribunal de Justiça de 14 de junho de 2011, no Processo C-360/09, Pfleiderer AG v. Bundeskartellamt." Revista de Concorrência e Regulação. (Almedina) 291-310. **Anastácio (2012)**

The Observer. November 25, 2001. "Blowing the final whistle." Accessed November 13, 2017. https://www.theguardian.com/business/2001/nov/25/businessofresearch.research **(*"Blowing the final whistle"* 2001)**

Cauffman, Caroline. 2011. "Access to Leniency Documents after Pfleiderer." World Competition 597-615. **Cauffman (2011)**

European Commission. 2016. "About the cartel leniency policy - European Commission" Accessed November 28, 2017. http://ec.europa.eu/competition/cartels/leniency/leniency.html **(European Commission 2016)**

Rossi, Leonor, and Miguel Sousa Ferro. 2016. "O private enforcement do Direito da Concorrência." Revista de Concorrência e Regulação (Almedina) 22: 131-195. **Rossi and Ferro (2016)**

Rossi, Leonor, and Patrícia Vinagre e Silva. 2017. "Public Access to Documents in the EU." In Public Access to Documents in the EU, by Leonor Rossi and Patricia Vinagre e Silva, 211-253. Oxford and Portland: HART Publishing. **Rossi and Vinagre e Silva (2017)**

Saavedra, Alberto. 2012. "Access by National Courts and Private Plaintiffs to Leniency Documents Held by the Commission." Revista de Concorrência e Regulação 10: 65-86. **Saavedra (2012)**

Wils, Wouter P.J. 2006. "Leniency in Antitrust Enforcement: Theory and Practice." The More Economic Approach to European Competition Law 203-248. **Wils (2006)**

Appendices

Appendix 1 - Access to Competition Law Documents Case-law Table

	Case nº CFI	ECJ	Parties	Nationality of the applicant	Date of Decision	Duration	Interventions	Link to appeal /1st instance	Successful party
1996	T-50/96		Primex, Kruse and Interporc v Commission	GER	12.04.96 17.09.98	29m	App: UK	C-417/98 P	App
	T-83/96		Gerard Van der Wal v Commission	BE	29.05.96 19.03.98	22m	App: NL	C-174/98P C-189/98 P	Def (Dismissed)
1997	T-188/97		Rothmans v Commission	NL	24.06.97 19.07.99	25m	App: SWE		App (full)
	T-309/97		Bavarian Lager v Commission	GER	09.12.97 14.10.99	22m	Def: UK		Def (Dismissed)
1998		C-189/98 P Joined C-174/98 P	NL and Van der Wal v Commission	BEL, NL	11.05.98 11.01.00	20m		T-83/96	App (full)
		C-417/98P	Commission v Primex, Kruse and Interporc	GER, UK	23.11.98 10.05.00	18m		T-50/96	(Removed)
2001 (Reg 1049/2001)									
2002	T-237/02		TGI v Commission	GER	08.08.02 14.12.06	52m	App: SWE, FIN Def: Schott Glass	C-139/07	App
2003	T-139/03		Nuova Agricast v Commission	IT	28.04.03 17.09.05	27m			(Removed)
	T-151/03		Nuova Agricast v Commission	IT	06.05.03 08.06.05	25m			(Removed)
	T-198/03		**Bank Austria v Commission**	AUS	06.06.03 30.05.06	35m			Def
	T-198/03 R		Bank Austria v Commission	AUS	06.06.03 07.11.03	5m			Def
2004	T-194/04		Bavarian Lager v Commission	UK	07.08.04 08.11.07	39m	App: EDPS	C-28/08 P	App
2005	T-237/05		Ed Odile Jacob v Commission	FR	17.06.05 09.06.10	60m	Def: Lagardère SCA	C-404/10 P	App
	T-403/05		My Travel v Commission	UK	15.11.05 09.09.08	33m		C-506/08 P	Def
2007	T-111/07		Agrofert v Commission	CZ	13.04.07 07.07.10	39m	App: SWE, FIN, DK Def: P.K. Orlen	C-477/10 P	App
	T-399/07		Basell v Commission	GER	31.10.07 25.01.11	39m	App: SWE, DK		(Removed)
	T-417/07		Lodato v Commission	IT	16.11.07 19.06.08	17m			(Removed)
	T-477/07		Cofra v Commission	IT	17.12.07 03.09.08	10m			App/Def (certain docs)
		C-139/07 P	Commission v TGI	GER	28.02.07 29.06.10	40m	Def (TGI): FIN, SWE	T-237/02	App (Commission)
2008	**T-344/08**		**EnBW v Commission**	GER	25.08.08 22.05.12	45m	App: SWE Def: Siemens, ABB	C-365/12 P	App
	T-380/08		**NL v Commission**	NL	09.09.08 13.12.13	63m			Def
	T-437/08		**CDC v Commission**	BEL	06.10.08 15.12.11	38m	App: SWE		App

	Case nº CFI	ECJ	Parties	Nationality of the applicant	Date of Decision	Duration	Interventions	Link to appeal /1st instance	Successful party
							Def: **Evonik Degussa**		
		C-28/08 P	Commission v Bavarian Lager	UK	23.01.08 29.06.10	29m	App: UK, Council Def: DK, FIN, SWE, EDPS	T-194/04	App
		C-506/08 P	Sweden v My Travel and Commission	UK, SWE	14.11.08 21.07.11	32m	App: DK, NL, FIN Def: GER, FR, UK	T-403/05	App? (back to beginning)
2009		**C-360/09**	**Pfleiderer AG v Bundeskartellamt**	GER	09.09.09 14.06.11	21m		Preliminary ruling	App
2010	**T-181/10**		**Reagens v Commission**	IT	23.04.10 20.03.14	35m			App/Def Investig
		C-404/10 P	Commission v Odile Jacob	FR	10.08.10 28.06.12	22m	App: CZ, FR Def: DK, SWE, Lagardère SCA	T-237/05	App
		C-477/10 P	Agrofert v Commission	CZ	23.09.10 28.06.12	21m	App: DK, FIN, SWE Def: PK Orlen	T-111/07	App/Def
2011	**T-534/11**		**Schenker v Commission**	GER	10.10.11 07.10.14	36m	Def: Many Interventions (members of cartel)		App/Def (partial access)
		C-596/11 P (Intervention)	Schenker AG v Commission	GER	21.11.11 08.06.12 (Order)	6m		T-28/11 (fines on airfreight cartel, not access)	Not authorized to intervene
		C-598/11 P (I)	Schenker AG v Commission	GER	21.11.11 08.06.12	6m		T-38/11	Not authorized
		C-600/11 P (I)	Schenker AG v Commission	GER	21.11.11 08.06.12	6m		T-40/11	Not authorized
		C-602/11 P (I)	Schenker AG v Commission	GER	21.11.11 08.06.12	6m		T-46/11	Not authorized
2012	T-185/12		HUK-Coburg v Commission	GER	23.04.12 27.06.14	22m	Cartels fourth plea application		(Removed)
	T-306/12		Spirlea v Commission (EU Pilot)	IT	10.07.12 25.09.14	27m	App: DK, FIN, SWE Def: CZ, SP	T-669/11 C-564/14 P	Def
	T-333/12		Soltau v Commission	GER	25.07.12 05.12.12 (Order)	5m			Def
	T-341/12		**Evonik Degussa v Commission**	GER	24.05.12 16.11.12 (Order)	6m		**C-162/15 P**	Def
	T-345/12R		**Azko Nobel & Others v Commission** (seeks restriction)	NL	03.08.12 16.11.12 (Order)	3m			App/Def
	T-402/12		Schlyter v Commission	SWE	06.09.12 16.04.15	31m	App: FIN, SWE Def: FR		App
	T-418/12		Beninca v Commission (lawyer for VFK)	GER	21.09.12 19.02.13 (Order)	5m			App?
	T-419/12		**LVM v Commission (carglass)**	GER	25.09.12 27.06.14	21m	Saint Gobain & AGC Glass asked to (I)		(Removed)

	Case nº CFI	ECJ	Parties	Nationality of the applicant	Date of Decision	Duration	Interventions	Link to appeal /1st instance	Successful party
	T-420/12		VHV v Commission (carglass)	GER	25.09.12 27.06.14	21m	Saint Gobain & AGC Glass asked to (I)		(Removed)
	T-421/12		Württembergische Gemeinde-Versicherung v Commission	UK	25.09.12 27.06.13	9m	Saint Gobain & ACG Glass asked to (I)		(Removed)
	T-462/12		**Pilkington v Commission**	UK	19.10.12 11.03.13	5m		C-278/13 P (R)	App/Def (partial)
	T-465/12		**AGC Glass & Others v Commission** (avoid victims intervention)	EU	19.10.12 27.11.13	13m		C-517/15 P	Def
	T-476/12		Saint-Gobain Glass Deutschland v Commission	GER	31.10.12 11.12.14	25m		C-60/15 P	Def
	T-526/12		**AXA v Commission** (carglass)	GER	05.12.12 04.06.14	18m	AGC Glass asked to (I)		No need to adjudicate (Def)
		C-365/12 P	**Commission v EnBW**	GER	31.07.12 19.02.14 (Order) 27.02.14 (Judgment)	19m	App: Siemens, AG, ABB Def: SWE	T-344/08	App
2013	**T-677/13**		**Axa v Commission (carglass)**	GER	19.12.13 07.07.15	19m	Def: Saint-Gobain		App
2015		C-60/15 P	Saint-Gobain Glass Deutschland v Commission	GER	11.02.15 13.07.17	29m		T-476/12	App
		C-162/15 P	**Evonik Degussa v Commission** (Case Under Analysis)	GER	08.04.15 14.03.17	23m		T-341/12	Def
		C-517/15 P	**AGC Glass & Others v Commission** (confidentiality request)	EU	25.09.15 26.07.17	22m			Def (Dismissed)

Appendix 2 - Statistical Table of Member States Interventions

Interventions (number of times)	Pro Access	Against Access
Czech Republic	**-**	**2**
Denmark	**7**	**-**
Finland	**8**	**-**
France	**-**	**3**
Germany (many German applicants)	**-**	**1**
Netherlands	**2**	**-**
Spain	**-**	**2**
Sweden	**13**	**-**
United Kingdom	**1**	**3**
Council	**-**	**2**
Private Parties (always interv. as a Def)	**3**	**14**

Appendix 3 - Access to Leniency Documents Case-law Table

	Case nº CFI	ECJ	Parties	Nationality of the applicant	Date of Decision	Duration	Interventions	Link to appeal /1st instance	Successful party
2003	T-198/03		Bank Austria v Commission	AUS	06.06.03 30.05.06	35m			Def
2008	T-344/08		EnBW v Commission	GER	25.08.08 22.05.12	45m	App: SWE Def: Siemens, ABB	C-365/12 P	App
	T-380/08		NL v Commission	NL	09.09.08 13.12.13	63m			Def
	T-437/08		CDC v Commission	BEL	06.10.08 15.12.11	38m	App: SWE Def: Evonik Degussa		App
2009		C-360/09	Pfleiderer AG v Bundeskartellamt	GER	09.09.09 14.06.11	21m		Preliminary ruling	App
2010	T-181/10		Reagens v Commission	IT	23.04.10 20.03.14	35m			App/Def Investig
2011	T-534/11		Schenker v Commission	GER	10.10.11 07.10.14	36m	Def: Many Interventions (members of cartel)		App/Def (partial access)
2012	T-341/12		Evonik Degussa v Commission	GER	24.05.12 16.11.12 (Order)	6m		C-162/15 P	Def
	T-345/12R		Azko Nobel & Others v Commission (seeks restriction)	NL	03.08.12 16.11.12 (Order)	3m			App/Def
	T-419/12		LVM v Commission (carglass)	GER	25.09.12 27.06.14	21m	Saint Gobain & AGC Glass asked to (I)		(Removed)
	T-462/12		Pilkington v Commission	UK	19.10.12 11.03.13	5m		C-278/13 P (R)	App/Def (partial)
	T-465/12		AGC Glass & Others v Commission (avoid victims intervention)	EU	19.10.12 27.11.13	13m		C-517/15 P	Def
	T-526/12		AXA v Commission (carglass)	GER	05.12.12 04.06.14	18m	AGC Glass asked to (I)		No need to adjudicate (Def)
		C-365/12P	Commission v EnBW	GER	31.07.12 19.02.14 (Order) 27.02.14 (Judgment)	19m	App: Siemens, AG, ABB Def: SWE	T-344/08	App
2013	T-677/13		Axa v Commission (carglass)	GER	19.12.13 07.07.15	19m	Def: Saint-Gobain		App
2015		C-162/15 P	Evonik Degussa v Commission (Case Under Analysis)	GER	08.04.15 14.03.17	23m		T-341/12	Def
		C-517/15 P	AGC Glass & Others v Commission	EU	25.09.15 26.07.17	22m			Def (Dismissed)

Appendix 4 - Leniency Case-law: Number of Victims of Cartels (seeking compensation) vs Number of Cartel Members (demanding confidentiality)

Victims	**11 out of 17**
Cartel Members	**6 out of 17**
Victims + Cartel Members Interventions	**6 out of 11**